SUPREME COURT, U.S.

FILED
JUL 10 1961
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 219

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY
a corporation, *Petitioner*,

v.

THE STATE TAX COMMISSION OF UTAH, *Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

DENNIS MCCARTHY,
S. N. CORNWALL,
L. R. GARDINER, JR.,
65 South Main Street
Salt Lake City, Utah
*Counsel for Petitioner*

## INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Constitution and statute involved | 2 |
| Statement of the case | 3 |
| Reasons for granting the writ | 5 |
| Conclusion | 12 |
| Appendix — Opinions and Judgment Below | i |


## CITATIONS

CASES:


| | |
|---|---|
| *Bangor & Aroostook R. R. v. American Railway Association*, 136 I. C. C. 727 | 7 |
| *Carson Petroleum Co. v. Vial*, 279 U. S. 95 | 9 |
| *Champlain Realty Co. v. Town of Brattleboro*, 260 U. S. 366 | 9 |
| *Freeman v. Hewit*, 329 U. S. 249 | 10 |
| *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U. S. 422 | 10 |
| *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 | 10 |
| *Nippert v. City of Richmond*, 327 U. S. 416 | 6, 10 |
| *St. Louis Southwestern Ry v. State of Arkansas*, 217 U. S. 136 | 7 |
| *United States v. Denver & Rio Grande Western R. R.*, 175 F. Supp. 662 | 7 |


CONSTITUTION:


| | |
|---|---|
| U. S. Constitution, Art I, Sec. 8 | 2 |

STATUTES: Page

Illinois Statutes Ann., Smith-Hurd (1954) Ch. 120, Secs. 440, 441 ..... 11

Interstate Commerce Act, Part I, Sec. 1 as amended, Sec. 1 (10) (11), 41 Stat. 476, 49 U. S. C. 1 (10) (11) 7

Sec. 1 (13) 41 Stat. 477, 49 U. S. C. 1 (13) ..... 7

Louisiana Rev. Stat. (1950) 47:301.(14)(e), 302C ..... 11

Power or Train Brakes Safety Appliance Act of 1958, 72 Stat. 86, 45 U. S. C. 9 ..... 7

Safety Appliance Act, 71 Stat. 352, 45 U.S.C. 13 ..... 7

Utah, Laws of, 1959 Ch. 113 ..... 2, 4

Utah Code Annotated 1953, 59-15-4(e) ..... 2, 3, 5, 6

Washington Revised Code 82.04.050 ..... 11

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

---

No. ____

---

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY
a corporation, *Petitioner*,

v.

THE STATE TAX COMMISSION OF UTAH, *Respondent*.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

---

The Denver and Rio Grande Western Railroad Company prays that a writ of certiorari issue to review the judgment of the Supreme Court of Utah, entered in the above entitled case January 13, 1961.

### CITATIONS TO OPINIONS BELOW

The decision of the State Tax Commission of Utah (R. 0043) is unreported and is printed in the Appendix hereto, infra, p. i. The opinion of the Supreme Court of Utah (R. 0045) is reported in 11 Utah 2d 301, 358 P. 2d 352, and is printed in the Appendix, hereto, infra, p. iii.

## JURISDICTION

The judgment of the Supreme Court of Utah was entered on January 13, 1961 (R. 0047; infra, p. vii). A timely petition for rehearing was filed February 16, 1961, (R. 0052). The petition was denied on April 13, 1961, (R. 0054). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), since a right, privilege, or immunity is specially claimed under the Constitution of the United States.

## QUESTION PRESENTED

Whether a tax imposed by a state on the amount charged by a railroad for repair of cars of other railroads used in interstate commerce is prohibited by the Commerce Clause of the Constitution of the United States.

## CONSTITUTION AND STATUTE INVOLVED

The case directly involves the following:

Article I, Section 8 of the Constitution of the United States, which reads:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Chapter 113, Laws of Utah 1959, which in pertinent part provides:

> **"SALES TAX — PROVIDING FOR TAX ON CERTAIN SERVICES**
>
> • • •
>
> **Section 1. Section Amended.**
>
> Section 59-15-4, Utah Code Annotated 1953, is amended to read:
>
> **59-15-4. Excise Tax — Rate.**
>
> From and after the effective date of this act there is levied and there shall be collected and paid:
>
> • • •

(e) A tax equivalent to 2% of the amount paid or charged for all services for repairs or renovations of tangible personal property, or for installation of tangible personal property rendered in connection with other tangible personal property."

The statute, as subsequently amended, is contained in 59/15-4(e) Utah Code Annotated 1953, 1961 Pocket Supplement.

## STATEMENT OF THE CASE

This case was an original proceeding in the Supreme Court of the State of Utah to review an order and decision of the State Tax Commission of Utah (referred to herein as "Tax Commission"). The Tax Commission imposed sales tax liability upon petitioner, The Denver and Rio Grande Western Railroad Company (referred to herein as "Rio Grande"), for charges made by it for repair of cars of other railroads in the movement of interstate commerce. The Utah Supreme Court affirmed the Tax Commission's decision (R. 0047, 0045). Petitioner now seeks review of the decision of that Court.

The facts are not in dispute. They are set forth in a written stipulation of the parties made a part of the record before the Tax Commission (R. 0021-0025).

Rio Grande is a common carrier in interstate commerce between points and places in the United States. As part of the nationwide system of railroads Rio Grande receives cars of other railroads in interchange and moves them over its lines. Such cars are designated in the railroad industry as "foreign line" cars. They may for short periods be used in intrastate movements, but are primarily engaged in the movement of interstate commerce and constitute instrumentalities devoted to the movement of interstate commerce.

While engaged in the movement of commerce railroad cars necessarily require occasional repair. The making of

and responsibility for all repairs to these "foreign line" cars are governed and controlled by the "Interchange Rules" of the Association of American Railroads (Exhibit A to the Stipulation of Facts, R. 0041). The railroad which owns the car must pay for repairs resulting from ordinary wear. This is called "owner line responsibility" in the industry, and the repairs involved in this case relate entirely to this type. The railroad engaged in movement of a car is called the "handling line," and it is responsible only for repairs resulting from its own fault. Such repairs are not involved in this case.

When foreign line cars are tendered to another railroad (in this case Rio Grande) in interchange, they may be in need of repair for which the owning line is responsible. The car need not be refused by the railroad to which it is tendered, but may be received and the repair made by the handling line. The necessity for "owner line" repair may also arise and the repair be made after interchange while a car is in possession of Rio Grande. The repairs involved in this case relate only to such "foreign line" cars received by Rio Grande in the course of movement in interstate commerce.

Rio Grande under contractual arrangements with The Western Pacific Railroad Company also performs minor repairs to Western Pacific's locomotives used in interstate commerce.

Rio Grande has heretofore paid use tax to the State of Utah on materials which it has used in repairs, but has not added to the amounts charged other lines any sales or use taxes.

The Utah legislature enacted a statute effective July 1, 1959, imposing "a tax equivalent to 2% of the amount paid or charged for all services for repairs or renovations of tangible personal property . . ." (Chapter 113, Laws of

Utah 1959; 59-15-4(e) Utah Code Ann. 1953, 1961 Pocket Supp.). In its quarterly tax return for July, August, and September 1959 Rio Grande deducted as exempt transactions amounts charged other railroads for costs incurred in repair of cars and locomotives. The Tax Commission assessed a deficiency of $467.63 claiming that such repairs were taxable under this statute.

Rio Grande applied to the Tax Commission for a hearing and correction of the tax assessed (R. 0019-0020). The federal questions sought to be reviewed here were raised in the request for formal hearing (R. 0020). Hearing was had before the Tax Commission on April 14, 1960, and a decision sustaining the deficiency against the Rio Grande was entered June 21, 1960. The Tax Commission expressly decided that the tax was not prohibited by the Federal Constitution (R. 0044).

A petition for writ of review was timely filed with the Supreme Court of Utah (R. 0001) and in said petition Rio Grande raised the federal questions here sought to be reviewed by repeating that portion of its request for hearing before the Commission (R. 0020) and by asserting in said petition that the imposition of the tax was a burden upon interstate commerce prohibited by the Commerce Clause of the United States Constitution (R. 0004). The Supreme Court of Utah affirmed and stated in its opinion the constitutional grounds which Rio Grande had asserted (R. 0047, 0045).

## REASONS FOR GRANTING OF THE WRIT

1. The decision below is believed to be erroneous and in conflict with prior decisions of this Court.

The tax in question is "a tax equivalent to 2% of the amount paid or charged for all services for repairs or renovations of tangible personal property . . ." (Laws of Utah